

## ORDER

and shoulder treatment. Respondent further argues that the ALJ's Order should be affirmed.

The sole issue raised on review is whether or not claimant's accidental injury arose out of and in the course of his employment with respondent.

**FINDINGS OF FACT**

After reviewing the evidentiary record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

In his Application for Hearing, claimant asserted that he injured his right arm and shoulder on approximately January 14, 2012, and each and every working day thereafter. Claimant described the January 14, 2012, accident as follows:

It was about 6:00 o'clock in the morning. I was working with Bob Spillman. And I slipped and fell on a plastic bag.<sup>1</sup>

Claimant fell directly on his right elbow when his feet went out from beneath him. Claimant was escorted to the nurse's station where the elbow was cleaned and a Band-Aid placed on the wound. The following Monday claimant returned to the nurse's station where the bandage was changed. He testified that at the time, his entire body hurt.

From January 16, 2012, through June 23, 2012, claimant did not receive any medical treatment for his right elbow and continued to work as a maintenance mechanic for respondent. Claimant and his wife left in their Ford F-150 pick-up for Sturgis, South Dakota, for a motorcycle convention on June 23, when he noticed pain in his right shoulder blade that morning. Claimant testified:

On the 23rd, we traveled, stopped in Nebraska for the night, got up the next morning on the 24th, still experiencing pain in my right shoulder blade; continued on to South Dakota, and spent the night when we got there. And Monday morning, on the 25th, I got up and was in a lot of pain. And I called my doctor here and told her that I thought maybe I was getting shingles again, because I had shingles back in September the year before. And it was a sort of the same kind of pain. So she sent me a prescription for pain pills. I got that filled.

On the 26th, I got out of bed. I hurt really bad, and we left Rapid City and went up to Sturgis, and my wife told me before we got there that if I didn't go to the emergency room that we were going to go home. So I went to the emergency room

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<sup>1</sup> Olmstead Depo. at 14.

on the 26th in Sturgis, South Dakota, and that doctor said he thought I had a pinched nerve in my neck. So he gave me a Demerol shot, prescribed me some Oxycontin, and suggested maybe I go to a chiropractor down the street. So I went and visited with that chiropractor, and he treated me, and the next day I drove up to Sturgis again, went to the chiropractor, and then again on the 28th I went to the chiropractor.<sup>2</sup>

Claimant testified that he could not think of anything, except that his accident in January 2012 could have caused the pinched nerve in his neck. He did not mention anything to the doctors in Sturgis that his condition was caused by something that happened at work.

Q. Is it accurate for me to say that you did not have the pain and problems that you were having on June 23rd, 2012, prior to that date?

A. Yeah. I wasn't in that much pain that I needed to go to a doctor.

Q. Okay. You kind of said that much pain. Were you having any pain before June 23rd, 2012?

A. I have pain every day, you know. I'm getting older. Yeah, I have pain every day, yes.<sup>3</sup>

After claimant returned to Kansas from his vacation, he sought treatment from his chiropractor, Dr. Gary Butler in July 2012. Claimant further testified:

Q. When did you come to the conclusion that the problems you were having were still related to your fall in January, 2012?

A. On one of my visits to Dr. Butler, the last -- I think it was the last visit that I went there, he had adjusted my back, and then he said, have you been having any trouble with your right elbow? And I said, no, I haven't. I said, back a while back -- I didn't even remember when it was -- I told him I fell on my elbow at work. And he took my elbow and popped it and popped it back into place. It had been out of place since January, I assume. And that hurt very bad. Now my arm and my hand is asleep, and it's been asleep since June.<sup>4</sup>

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<sup>2</sup> *Id.* at 24-25.

<sup>3</sup> *Id.* at 27.

<sup>4</sup> *Id.* at 29-30.

Claimant also received treatment from Dr. Maureen P. Roos. The only documented medical evidence in the record are notes from July 24 and August 16, 2012, notes of Dr. Roos. Dr. Roos' notes from her July 24, 2012, examination of claimant indicated that claimant was in for a possible pinched nerve that he had for a month and has pain in the upper shoulder and back, with extreme pain into the right elbow that radiates down into the hand and up into the triceps. Dr. Roos notes from the July 24, 2012 visit stated, "He does not have any inciting events. This started when he was up in South Dakota on vacation."

Dr. Roos' August 16, 2012, notes, indicated claimant had undergone MRIs of the cervical spine, right shoulder and right elbow. The cervical spine MRI revealed degenerative disc disease, while the right shoulder MRI showed a partial supraspinatus tear. The right elbow MRI disclosed no evidence of fracture or dislocation, but there was concern about nerve damage. Dr. Roos' diagnoses were severe right shoulder pain, possibly rotator cuff and right elbow pain with concern of a ligament injury.

#### **PRINCIPLES OF LAW**

K.S.A. 2011 Supp. 44-501b(c) provides:

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508(h) provides:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2011 Supp. 44-508(d) defines accident:

"Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2011 Supp. 44-508(e), in part, provides:

“Repetitive trauma” refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. “Repetitive trauma” shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

### ANALYSIS

The record is clear that claimant sustained a personal injury by accident arising out of and in the course of his employment with respondent on January 14, 2012. However, that injury was limited to a minor cut on claimant’s right elbow. Claimant continued to work for respondent and sought no additional medical treatment until he was on vacation, some five months later. Claimant himself, did not believe the medical condition that developed during his vacation was work related until he saw Dr. Butler. When claimant saw Dr. Roos in July 2012, he indicated the pain in his neck, shoulder and right arm developed while on vacation in South Dakota. There was no medical evidence that the neck, right shoulder and right elbow injuries claimant complained of in June 2012 were the result of the January 14, 2012, accident at work or the result of claimant’s work activities.

Moreover, claimant provided little testimony about his job activities with respondent, the repetitive nature of those job activities, or how those job activities caused his alleged injuries. Claimant also testified that he throws darts on Monday evenings in a dart league, but not every Monday night. He is right-handed and uses his right hand to throw darts. Claimant was able to engage in this activity even after the January 14, 2012, injury. The undersigned Board member agrees with the ALJ that claimant failed to prove by a preponderance of the evidence that the injuries he complained of in June 2012, were injuries by repetitive trauma that arose out of and in the course of his employment with respondent.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>5</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>6</sup>

**WHEREFORE**, the undersigned Board Member finds that the April 5, 2013, preliminary hearing Order entered by ALJ Nelsonna Potts Barnes is affirmed.

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<sup>5</sup> K.S.A. 44-534a.

<sup>6</sup> K.S.A. 2011 Supp. 44-555c(k).

**IT IS SO ORDERED.**

Dated this 28th day of June, 2013.

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HONORABLE THOMAS D. ARNHOLD  
BOARD MEMBER

c: Chris A. Clements, Attorney for Claimant  
cac@cl.kscoxmail.com; rdl@cl.kscoxmail.com

Matthew Schaefer, Attorney for Respondent and its Insurance Carrier  
mschaefer@mtsqa.com

Nelsonna Potts Barnes, ALJ